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In the Supreme Court of the United States

PHILIP BOURQUARDEZ, as Receiver of Six Mile Creek Kennel Club, Inc., a corporation,
Appellant,

vs.

FLORIDA STATE RACING COMMISSION,
Appellee.

BRIEF OF APPELLANT IN REPLY

To

Statement of Appellee, Florida State Racing Commission Opposing Jurisdiction and Motion To Dismiss or Affirm.

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The highest state court based its decision squarely upon the 1935 proviso and not upon the 1949 Act, which was, under Florida organic law, an "attempted judicial decree by the legislative power". *Harris et al. v. State ex rel. Wester,* 159 Fla. 195, 31 So. 2d 264.

The twelve months from the passage of the 1935 proviso was the only period in which failure to conduct a racing meet could constitute a violation of the racing law, for, under the original racing law (Section 4 of Chapter 14832, Laws 1931, reenacted in Section 4 of Chapter 17276, Laws 1935), any person, association, or

corporation *"shall have the right", not the duty,* to conduct a racing meet each year. Therefore, for the years subsequent to 1935 appellant ought not to be penalized for the nonperformance of acts he was "not required to do". *State Board of Medical Examiners v. Morlan,* 147 Fla. 695, 3 So. 2d 402.

The first revocation of this permit by the Racing Commission, which necessarily disrupted plans of the Receiver to operate the track as authorized by the Court, was quashed by the Supreme Court upon petition for certiorari by the Receiver (paragraphs 3, 4 and 5 of Petition for Certiorari in Florida Supreme Court) on the ground that *willful* violation was not shown. *Six Mile Creek Kennel Club, Inc. et al. v. State Racing Commission,* 119 Fla. 142, 161 So. 58. The revocation now sought to be squashed contains no finding or suggestion that failure to conduct a racing meet was willful. In truth, the permit was "in possession of the Court". *McKinnon-Young Co. et al. v. Stockton et al.,* 55 Fla. 708, 46 So. 87.

Before the next racing season opened following the mandate quashing the first revocation, appellee Racing Commission rendered it impossible for this permit holder to perform the condition of the 1935 proviso by prematurely revoking this permit before the time for performance of the condition. (Unnumbered paragraphs 7 and 8 of Exhibit D to Petition for Certiorari.) Appellant here repeats the apt words of Mr. Justice Swayne in *Davis v. Gray, Receiver,* 16 Wall. 203, 21 L. Ed. 447, 456:

> "Here the controlling consideration is that the performance of all the conditions not performed was prevented by the state herself".

The Racing Commission prematurely revoked a permit to conduct a racing meet, and then contended that the holder had, by failure to conduct that racing meet, forfeited his permit. Clearly the Racing Commission is not entitled to so contend:

> "The conduct of administrative board toward those with whom it deals should be so fair that there is no ground to invite suspicion".
>
> "Administrative board may not withhold evidence that the law requires it to keep and then contend that one entitled thereto has not proved his case". *York et al., State Board of Dental Examiners, v. ex rel. Schwaid,* 152 Fla. 285, 10 So. 2d 813, Headnotes 4 and 5.

Nonuse of this permit, if any, is attributable to the fault of the Racing Commission in prematurely revoking the permit.

The 1935 proviso, imposing the penalty of forfeiture for failure to conduct a racing meet, was omitted from Florida Statutes, 1941, and was, therefore, repealed by Section 16.20 thereof.

> "The effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted * * *." *Pensacola & A. R. Co. v. State,* 45 Fla. 86, 33 So. 985, citing *State of Maryland v. The Baltimore & Ohio Railroad Co.,* 3 How. 534, 552, 11 L. Ed. 714, 722, an appeal from state court to this court, wherein Chief Justice Taney, speaking for the Court, said: "The repeal of the law imposing the penalty, is of itself a remission."

Thereafter, in a suit by the Receiver against the Racing Commission for a declaratory decree, the Circuit Court decreed this permit "valid and outstanding" and authorized the Receiver to "sell and convey" the permit, and this decree was affirmed (Petition for Certiorari,

paragraph 9). However, before another racing season opened the Racing Commission again, for the third time, revoked this permit without notice (Exhibit D to Petition for Certiorari).

A racing plant in existence is not prerequisite to the issuance and ratification or confirmation of a racing permit (*State ex rel. Hollywood Jockey Club v. Stein*, 129 Fla. 777, 176 So. 849).

Appellee assumes appellant has no defense and in so doing overlooked the principle that:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 59 L. Ed. 1027, 1032.

Appellee, in stating that a racing permit may be withdrawn "upon certain conditions", fails to state that the case cited by him to sustain this position, *State ex rel. Biscayne Kennel Club v. Stein*, 139 Fla. 517, 178 So. 133, involved an apportionment of *racing dates* and the validity or character of *racing permits* was in no way involved there or in the cases there cited, and any characterization of *racing permits* was obiter dictum and in no way binding on this Court. *Humphrey v. United States*, 295 U. S. 602, 79 L. Ed. 1611; *Pell v. State*, 97 Fla. 650, 122 So. 110, Headnote 2.

Appellee does not contend that any right of repeal of the permit was reserved, but that the permit may be withdrawn "upon certain conditions". If a permit may be withdrawn "upon certain conditions",

then the principle of the Havemeyer case, cited in appellant's Statement as to Jurisdiction, applies, and "valid cancellation for condition broken cannot be accomplished without giving to the holder an opportunity to have the asserted default judicially determined". *Public Service Commission v. Havemeyer,* 296 U. S. 506, 517, 80 L. Ed. 357, 364.

In Florida:

> "A franchise is a special privilege conferred upon individuals or corporations by a governmental authority to do something that cannot be done of common right."
>
> "Whether a governmental franchise in this state is to be regarded as realty or personalty, it is a property right, * * * ." *Leonard v. Baylen Street Wharf Co.,* 59 Fla. 547, 52 So. 718.

The permit here involved was authorized to be and was duly issued to and accepted by appellant's predecessor and ratified by an election to conduct racing meets upon certain described real estate, and racing was conducted thereunder and indebtedness incurred thereby to the creditors represented by appellant Receiver, and this permit is a special privilege conferred by governmental authority to do something that cannot be done by common right, and is therefore a franchise or property right.

> "A 'franchise' is a special privilege conferred by the government on individuals which does not belong to the citizens of the country as a common right, and, when a franchise is accepted, it becomes a contract irrevocable unless right to revoke is expressly reserved and such franchise is entitled to the same protection under the constitutional guaranties as other property." *Winter v. Mack,* 142 Fla. 1, 194 So. 225, Headnote 2.

"Possession of a license to pursue profession of race horse trainer was a valuable property right of which licensee could not be deprived without due process of law. F.S.A. Const. Bill of Rights, Sec. 12; U.S.C.A. Const. Amend. 14." *State v. Baldwin,* 159 Fla. 165, 31 So. 2d 627, Headnote 2.

"The *organic requirements* of due process of law *are controlling* when life, liberty, or property rights are involved in any official action, whether it be the exercise of powers of government by those properly belonging to the governmental departments, respectively, as divided and limited by the Constitution, or whether the action is a duly authorized *administrative* or *ministerial* function or duty." (Emphasis supplied). *Williams v. Kelly,* 133 Fla. 244, 182 So. 881.

Apropos of the contention of appellee that it had the right to revoke the permit of this track without notice, it would be interesting to observe the reaction of LeRoy Allen, of counsel for appellee and also attorney for the only other dog track in Hillsborough County, if the permit of that incorporated track was revoked without notice because its President, William H. (Bill) Johnston, of the Capone gang, admitted before the special Committee to Investigate Organized Crime in Interstate Commerce that he had (in violation of Florida Statutes, 1941, Section 550.07, and prima facie acting in behalf of such corporate permit holder, Florida Statutes, 1941, Section 875.19) "contributed about $100,000, of which $40,000 was his own money, to the election campaign of Governor Fuller Warren of Florida." (Page 3 of Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, Senate Report No. 2370, 81st Congress, 2nd Session, printed August 18, 1950). So long as the Capone gang are riding the racing saddles of Florida it is not likely that the Rac-

ing Commission will revoke that permit, for the Committee Report says (on page 5):

> "The Florida State Racing Commission has announced that it will undertake a sweeping investigation into contributions to political campaigns by individuals connected with the operation of horse and dog racing tracks. Such contributions are prohibited by state law. In evaluating this announcement, however it should be noted that, notwithstanding the uncontradicted testimony before the Committee that William H. Johnston had contributed $100,000 to the gubernatorial campaign fund of Governor Fuller Warren, Johnston has obtained racing dates for his four Florida Dog Tracks for the next season."

The cases of *Mellon v. O'Neil,* 275 U. S. 212, 72 L. Ed. 245, and *Detroit City Railway Co. v. Guthard,* 114 U. S. 133, 29 L. Ed. 118, cited by appellee, are not in point, for in each of those cases it is expressly stated that the record does not show that a constitutional question was presented to the State Court.

In *Missouri ex rel. Hurwitz v. North,* 271 U. S. 40, 70 L. Ed. 818, cited by appellee, a license was revoked after twenty days' statutory written notice was personally served, and the testimony of all witnesses who appeared, including licensee, was taken and recorded. This was held due process, though the statute, as interpreted by the state court, entitled the licensee to take testimony on deposition as provided by the statute, but not to subpoena witnesses to appear before the court.

The case of *Olsen v. Nebraska,* 313 U. S. 236; 85 L. Ed. 1305, cited by appellee, involved a state statute fixing the maximum compensation which private employment agencies may collect from applicants for employment.

In *Valentine Goezart et al. v. Clearly, et al.*, 335 U. S. 464, 93 L. Ed. 163, cited by appellee, a statute forbidding women from being licensed as bartenders and at the same time making an exception in favor of the wives and daughters of the owners of liquor establishments was held valid.

The case of *Walker H. Gant, et al., v. Oklahoma City*, 289 U. S. 98, 77 L. Ed. 1058, cited by appellee, involved a municipal ordinance, making the filing of a surety company bond in the sum of $200,000 for the payment of any resulting damages to person or property a condition of the right to drill a gas or oil well within the City limits. The court recognized the peculiar dangers incident to the drilling and operation of an oil or gas well within the limits of a city. In that case the condition applied to all alike, while in the instant case the Racing Commission arbitrarily revoked this permit before the time for compliance with the 1935 proviso and thus rendered it impossible for this holder to comply with the proviso. Also in that case the ordinance required a bond "conditioned for the payment of damages on account of injuries to property, bodily injuries, etc., suffered by anyone and resulting from the drilling, operation or maintenance of any well or any structures, etc., appurtenant thereto." In the instant case there were no such peculiar damages incident to the failure to conduct a racing meet, nor can the public health, public morals, or public safety be injuriously affected by the failure to conduct a racing meet.

The decision of this case is of great public importance, for, if this revocation without notice and opportunity to be heard be affirmed, a flood of acts of arbitrary tramplings by men of evil design upon the affairs of citizens will overflow the tenets by which this nation lives.

Respectively submitted,

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